NO. 21,351

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LARRY LEE CHRISTIANSEN,

Plaintiff and Appellant,

v.

JOSEPH C. O'CONNOR, Sheriff of San Diego County, State of California,

Defendant and Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

APPELLEE'S BRIEF

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LIST OF AUTHORITIES CITED

LIST OF AUTHORITIES CITED (Cont.)

TOPICAL INDEX

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JURISDICTIONAL STATEMENT

The United States District Court has jurisdiction to entertain a petition for a writ of habeas corpus by a state prisoner. 28 U.S.C.A. § 2241 (a), (c) (3). Such a petition was filed by appellant on June 8, 1966. (Cl. Tr. p. 2.)

This Court has jurisdiction to review on appeal a final order of a district judge denying a writ of habeas corpus when a certificate of probable cause has been granted. 28 U.S.C.A. § 2253. The order dismissing the petition was filed on July 8, 1966, and entered on July 11, 1966. (Cl. Tr. p. 10.) An order granting a certificate of probable cause was filed July 18, 1966. (Cl. Tr. p. 22.) A notice of appeal was filed on August 5, 1966. (Cl. Tr. p. 23.)

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STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

(A summary of the allegations of the petition follows:)

Petitioner was charged with grand theft in a complaint filed with the California Municipal Court, San Diego Judicial District, on November 23, 1962.

Two months later petitioner was arrested in Arizona and was continuously imprisoned until November 19, 1965. From April 5, 1963, to September 2, 1964, he served a term in the Arizona State Prison for burglary and issuing checks without sufficient funds. In the federal courts he was convicted of transporting a stolen car in interstate commerce. He served three years concurrent with his Arizona term. After September 2, 1964, he completed his federal term first at La Tuna, Texas, until July 1, 1965, and then at Sandstone, Minnesota, until November 19, 1965. He was paroled to Arizona and his term expired on January 31, 1966. (Cl. Tr. p. 3.)

A detainer from San Diego was placed on petitioner on the day of his arrest. He signed a waiver of extradition. Subsequently, the San Diego District Attorney initiated an extradition request which was forwarded to Arizona on February 5, 1963, "and returned on April 8, 1963, because of petitioner's sentence to the Arizona State Prison." A detainer was placed on petitioner at the Arizona State Prison, but not at the federal institutions. (Cl. Tr. pp. 3-4.)

In July 1964 petitioner made a "Motion to Quash a Pending Charge for Failure to Prosecute" which he now terms a written demand for trial or dismissal. The District Attorney took no further action to obtain custody.

Petitioner came to San Diego in February of 1966, was arrested for "suspicion of burglary," and was later booked on the grand theft charge.

APPELLANT'S CONTENTIONS

It is contended that appellant was denied the right to a speedy trial and that there was an unreasonable delay in bringing him to trial.

SUMMARY OF APPELLEE'S ARGUMENT

Appellee contends:

1. That state remedies have not been exhausted;

2. That appellant was not in custody when he brought his petition and has not named or served an indispensible party, his custodian; and

3. That the California authorities were not responsible for the delay in bringing appellant to trial.

ARGUMENT

I

THERE HAS BEEN NO EXHAUSTION OF STATE REMEDIES

Appellant contends that he has exhausted his state remedies and we disagree. He relates that he has done the following in this respect:

1. He made a motion at the preliminary hearing. (Cl. Tr. p. 4.)

2. He moved the Superior Court to dismiss and set aside the information.

3. He filed a petition for a writ of prohibition or mandamus in the District Court of Appeal.

4. He petitioned the Supreme Court for a hearing on the same question.

At the time the petition was filed no trial had been had. He asked to have state proceedings stayed and prevented. (Cl. Tr. p. 5.) In his appeal brief he tells us he was tried and convicted on June 9, 1966, and sentenced to state prison August 30, 1966. (App. Op. Br. p. 5.) His appeal is apparently pending.

The trial judge stated that state remedies had been exhausted. (Cl. Tr. p. 10.) We do not disagree with the trial court's action disposing of the case on the merits, as it is always proper to rule against a petitioner on the merits even if state remedies have not been exhausted, but we take issue with the statement that there had been exhaustion, and we press the point as an additional reason for affirming the judgment below. The court recited in its opinion that appellant had been tried, convicted, and sentenced. (Cl. Tr. p. 11.) Appellant now tells us that when the opinion below was filed he had not yet been sentenced. (App. Op. Br. p. 5.)

Thus he had the right to appeal and to make a motion

for new trial and he is still exercising the former right.

It is our position that there has been no sufficient presentation of the matter to the District Court of Appeal and the Supreme Court. The writs that were filed do not adequately replace the appeal and are not a substitute for it. There are occasions on which appellate courts have denied pretrial writs but recognized the defendant's position on appeal. People v. Elliot, 54 Cal. 2d 498, 505, 6 Cal. Rptr. 753. The various California remedies available to petitioner are outlined in People v. Wilson, 60 Cal. 2d 139, 148-52, 32 Cal. Rptr. 44, and the continued viability of the remedy by appeal is explained therein.

The denial of an extraordinary writ in California does not ordinarily bar, or detract from the vitality of, the appellate remedy. In People v. Pipes, 179 Cal. App. 2d 547, 551-52, 3 Cal. Rptr. 814, it was said:

> "The case at bar comes within the general rule that 'denial without opinion of an alternative writ adjudges nothing except that, for reason sufficient to the court, the writ should not be issued; this is true except in rare instances.' [Citing case.] Such a denial 'is not res judicata of the legal issue presented by the application unless the sole possible ground of the denial was that the court acted on the merits, or unless it affirmatively appears that such

denial was intended to be on the merits.' [Citing case.] There is no indication that the denial in question was intended to be on the merits rather than an exercise of the discretion vested in the court respecting such matters. [Citing case.] There was no intention to foreclose the defendant from resorting to his remedy on appeal."

The ordinary rule is that a federal court should stay its hand on habeas corpus pending completion of the state court proceedings. Ex Parte Royall, 117 U.S. 241, 251, 29 L. Ed. 868, 6 Sup. Ct. 734 (1886). As a general proposition, federal habeas corpus is not available while a prisoner's appeal from his conviction is pending in the state courts. Shelton v. South Carolina, 285 F.2d 540 (4th Cir. 1961); Louisiana ex rel. White v. Clemmons, 235 F. Supp. 253, 254 (D.C. La. 1964).

This Court has always paid due and careful respect to the principles of comity so essential to the successful operation of our federal system. Rose v. Dickson, 327 F.2d 27, 28-29 (9th Cir. 1964); see too Schiers v. State of California, 333 F.2d 173, 175 (9th Cir. 1964). We ask it to adhere to them once again and to allow to the state courts a full opportunity to deal with state criminal matters. See Douglas v. City of Jeannette, 319 U.S. 157, 163 (1943).

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II

NO INDISPENSABLE PARTY IS
NAMED OR SERVED

The petition recites that the appellee is the custodian of petitioner, but it goes on to disprove this fact by stating that petitioner is on bail pending trial. (Cl. Tr. p. 2.) In fact the only connection of the appellee to the case that is clearly alleged is that the appellee had custody of petitioner between the time he was committed before trial on March 31, 1966, until he made bail on May 10, 1966. The petition recites, "Petitioner has been on said bail since May 10, 1966." (Cl. Tr. p. 2.)

It is settled that a person charged with crime who is on bail is not in sufficient custody to bring habeas corpus. Matysek v. United States, 339 F.2d 389, 393-95 (9th Cir. 1964).

In the opening brief on appeal (but not otherwise in the record) it is alleged that petitioner "is now in custody of the California Department of Corrections." Neither that body nor its personnel are, or were, parties to this suit. It is well settled that a prisoner's keeper is an indispensable party in habeas corpus and must be named and served.

Magee v. State of California, 365 F.2d 831 (9th Cir. 1966);

Morehead v. State of California, 339 F.2d 170, 171 (9th Cir. 1964);

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Roseborough v. California, 322 F.2d 788 (9th Cir. 1963);

Bohm v. Alaska, 320 F.2d 851 (9th Cir. 1963);

King v. State of California, 356 F.2d 950 (9th Cir. 1966).

The totality of the situation is that appellant sought to bring habeas corpus prior to trial when he was not in custody but on bail against a person who had him in custody at some time in the past and that if he has since then been put into custody he has not sued here the person who detains him. Manifestly, this Court has no jurisdiction under these conditions.

III

PETITIONER WAS NOT DENIED THE RIGHT TO A SPEEDY TRIAL

Before petitioner could be prosecuted for the offense under which he is presently detained in California he was arrested, prosecuted, and served sentences for the Arizona and federal authorities. The San Diego District Attorney sought to secure his return from Arizona but when the Arizona authorities declined to send him back no further effort was made to compel appellant's return. Appellant did not notify the San Diego District Attorney when he was transferred to the federal prison system.

We agree with the District Court that the weight of authority is to the effect that the speedy trial provision of

the Sixth Amendment has not been applied directly to the states[1] (Cl. Tr. p. 12) but that the due process clause does protect defendants against certain unreasonable delays that preclude them from preparing a defense. See People v. Wilson, 239 Cal. App. 2d 358, 365, 48 Cal. Rptr. 638.

We agree with the District Court that the majority rule is that a state need not attempt to bring a defendant to trial when he is incarcerated in a federal prison. (Cl. Tr. p. 6.) The District Court endorsed the minority rule to the effect that a state is required to use diligence to obtain a federal prisoner, but we find it sufficient merely to agree with the District Court that even under the minority rule adequate diligence was shown here to avoid transgressing the due process clause. The San Diego District Attorney did make one attempt to secure appellant's return and apparently did not know appellant was transferred to a federal prison. (Cl. Tr. p. 17.) Appellant did not notify the District Attorney of his transfer. Appellant was promptly arrested, tried, and convicted when the State had its first knowledge he was not incarcerated in Arizona.

California has taken a leading role in effectuating concurrent sentences and solving problems relating to prisoners with service due to two sovereigns. In re Stoliker, 49 Cal. 2d

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1. We do not regard Hoag v. New Jersey, 356 U.S. 464, 472 (1957) as undermining this authority or as leaving the question open.

75, 315 P.2d 12; In re Satterfield, 64 A.C. 438. California has also reacted with vigor in insisting that District Attorneys exercise due diligence to secure federal prisoners for pending charges. Barker v. Municipal Court, 64 A.C. 872. However, it remains true that there are difficult problems in this area of reconciling the interests of various sovereigns and that it was appellant originally who created the difficulties by reason of the fact that he offended three sovereigns. In view of all the circumstances, it is respectfully submitted that sufficient diligence has been shown.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the judgment below be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the Rules of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ JACK K. WEBER
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Deputy Attorney General